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No. 84-504

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, *et al.*,
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

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16

## TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 6 |
| ARGUMENT | 6 |
| I. Section 205(a) Imposes No General Obligation on the FCC To Employ Trial-Type Oral Hearings To Determine Industry-Wide Policy for the Future, and Neither Appellate Decisions Nor Prior FCC Practice Establish Such a Requirement | 6 |
| II. NASUCA's Claim That an Oral Hearing Was Required in the Particular Circumstances of This Case Is Mistaken and Does not Present any Issue Appropriate for Review by This Court | 9 |
| CONCLUSION | 13 |


## TABLE OF AUTHORITIES

CASES:


| | |
|---|---|
| *American Airlines* v. *CAB*, 359 F.2d 624 (D.C. Cir.) (*en banc*), *cert. denied*, 385 U.S. 843 (1966) | 11 |
| *AT&T* v. *FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978) | *passim* |
| *Bell Telephone Co.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) | 9 |
| *Chevron, U.S.A.* v. *NRDC*, 104 S. Ct. 2778 (1984) | 9 |
| *Computer and Communications Industry Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983) | 8 |
| *Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975) | 8,12 |
| *NARUC* v. *FCC*, No. 84-95 | 2 |

Page

*North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) ..... 8

*United States* v. *Florida East Coast Railway*, 410 U.S. 224 (1973) ..... *passim*

*Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978) ..... 9,12

*Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) ..... 8

STATUTES AND COURT RULES:

Communications Act, Section 205(a), 47 U.S.C. § 205(a) (1982) ..... *passim*

Interstate Commerce Act, Section 1(14)(a), 49 U.S.C. § 1(14)(a) (1970) ..... 7

Sup. Ct. Rule 17 ..... 6

Sup. Ct. Rule 22.1 ..... 1

ADMINISTRATIVE PROCEEDINGS:

*In re AT&T*, 61 F.C.C.2d 587 (1976), *aff'd in part and rev'd in part*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981) .. 8

Interstate Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Companies, FCC Docket No. 84-800 ..... 4

Investigation of Access and Divestiture Related Tariffs, FCC Docket No. 83-1145 ..... 4

MISCELLANEOUS:

Davis, K., *Administrative Law Treatise* (2d ed. 1978) ..... 10

Friendly, "Some Kind of Hearing," 123 *U. Pa. L. Rev.* 1267 (1975) ..... 10

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## BRIEF OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

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Pursuant to Rule 22.1 of the Rules of this Court, respondent American Telephone and Telegraph Company ("AT&T") opposes the petition for certiorari filed by the National Association of State Utility Consumer Advocates ("NASUCA") and the South Carolina Consumer Advocate.

## STATEMENT OF THE CASE

This case arises out of a broad-gauged rulemaking proceeding conducted by the Federal Communications Commission to resolve major questions of policy. In the orders under review, the FCC established for the future a new industry-wide structure for interstate rates to recover the interstate costs of local telephone companies originating and terminating interstate calls. NASUCA's claim is that Section 205(a) of the Communications Act, 47 U.S.C. § 205(a)—which authorizes the FCC to prescribe charges for telephone service "after full opportunity for hearing"—required the Commission to utilize trial-type oral hearings rather than rely on evidence submitted in notice-and-comment rulemaking.[1] The Court of Appeals rejected that claim. Pet. App. 52a-55a.[2]

1. For many years, AT&T in cooperation with local telephone companies provided interstate telephone service in the United States. During this period, AT&T filed interstate rates with the FCC concurred in by the local companies and, out of the revenues generated, recouped its own costs and compensated the local companies for the use of their facilities in originating and terminating interstate calls.

Beginning in the 1970s, changes in federal policy led to the entry of other common carriers providing interstate telecommunications service (*e.g.*, MCI, Sprint, SBS) who also use local telephone company facilities to originate and terminate their calls. It quickly became clear that the

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[1] NASUCA also claims that the FCC lacked authority to provide, in the orders under review, that certain fixed interstate costs be recovered from end users through fixed monthly charges. This is the same claim made by NARUC in its petition in No. 84-95 and AT&T has responded to it in an opposition filed September 19, 1984.

[2] "Pet. App." refers to Appendix A to the petition for certiorari in *NARUC* v. *FCC*, No. 84-95, which also seeks review of the Court of Appeals' decision. Appendix A reprints the lower court's opinion.

local telephone companies were being compensated by different carriers and other users through a variety of *ad hoc* and inconsistent pricing arrangements. Accordingly, the FCC instituted this rulemaking (Docket No. 78-72) to determine central policy issues and establish a rate structure that would rationally and equitably divide the interstate costs of local telephone companies consistent with the FCC's objectives, including the preservation of universal service.

In Docket No. 78-72, the FCC was not concerned with setting the ultimate rates that particular local telephone companies would charge for the use of their facilities to originate and terminate interstate calls. Its task was to develop rate structure policies applicable across the board to all carriers and customers based on legislative-type judgments as to the interstate rate structure that would secure the FCC's goals. These policies, designed for prospective application, were to be implemented through tariffs filed by the local telephone companies subject to scrutiny and challenge under ordinary statutory procedures.

2. The FCC issued its notice of inquiry and proposed rulemaking in Docket No. 78-72 in 1978 and over the next four years the Commission refined the issues through four supplemental notices of inquiry. These notices, and other requests or opportunities for comment, elicited thousands of pages of submissions, including a vast amount of relevant factual information. The opportunity to submit such evidence was virtually unlimited. Scores of parties participated at one stage or another of the rulemaking proceedings, and the FCC received thousands of pages of comments on its proposed rules from members of the general public.

After an exhaustive review and thorough analysis of the comments, the FCC in February 1983 issued an order

adopting basic rate structure policies for recovering interstate costs of local telephone companies. This order was followed by a number of reconsideration petitions challenging various aspects of the Commission's plan, and in August 1983 the Commission revised its initial plan in several basic respects. After receiving further petitions for reconsideration, the FCC revised the plan still further in February 1984. See Pet. App. 27a-32a.

Under the Commission's plan, certain fixed interstate costs of the local telephone companies will eventually be paid through fixed monthly charges by end users who cause those costs.[3] End users are grouped into three classes—residential, single-line business, and multi-line business end users. Such charges for residential and single-line business end users are not yet in effect but will be phased in beginning in June 1985.[4] Charges for multi-line business end users have gone into effect and vary from company to company subject to a ceiling of $6 per month.[5] Those tariffs are presently under review in pending Commission proceedings.[6]

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[3] It is the end user charges, designed to recover those fixed costs caused by subscribers, which concern NASUCA. Under the FCC's plan, other fixed costs of the local telephone companies, attributable to specific interstate carriers, would be paid by those carriers. Traffic sensitive costs, which vary with the traffic generated by each interstate carrier, are ultimately to be apportioned among the interstate carriers on the basis of usage.

[4] Tariffs setting end user charges for residential users and single-line businesses have not been filed although the FCC has determined that those charges should not exceed $4.00 per line through 1990. In a proceeding still underway, the FCC is considering exemptions to this end user charge so far as may be necessary to protect universal service.

[5] Despite NASUCA's references to $6 as a rate (Pet. 20 n.9, 28-29), it is in fact a generally applicable *ceiling* and the actual rates filed by individual companies vary.

[6] Investigation of Access and Divesture Related Tariffs, FCC Docket No. 83-1145. See also Interstate Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Companies, FCC Docket No. 84-800.

3. When the FCC adopted its decision in Docket No. 78-72, numerous parties sought judicial review challenging different aspects of the decision. NASUCA did not itself petition for review but it did file an intervenor's brief seeking reversal. It claimed, so far as pertinent here, that Section 205(a) of the Communications Act, which authorizes the Commission to prescribe charges for telephone service "after full opportunity for hearing," required the Commission to utilize trial-type oral hearings rather than rely on notice-and-comment procedures.[7] In June 1984, the Court of Appeals issued a lengthy *per curiam* decision affirming the FCC on all of the basic questions presented below. Pet. App. 19.

In its decision, the Court of Appeals rejected NASUCA's claim of procedural error. It observed that the FCC was not prescribing specific revenue requirements or determining the legality of specific rates, but instead was undertaking "broad-gauged rulemaking to develop policies for the interstate [telephone] market and it set prospective, policy-implementing rules." Pet. App. 54a. The court found NASUCA's position unsupported by case law or past agency practice, and the court held that the procedures followed "in this extraordinary matter" were appropriate. *Id.* The court observed that requiring a trial-type hearing in a multi-party proceeding involving policy issues as complex as those here would have rendered the rulemaking "almost interminable," precluding the agency from establishing a policy for the 1980s. *Id.* at 55a.

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[7] During the agency proceeding NASUCA had not asserted that trial-type oral hearings were required by statute, nor identified specific issues warranting such hearings. Instead, in a single pleading filed four years after Docket No. 78-72 had begun, NASUCA simply said in general terms that it thought that the importance of the case warranted "an oral argument or evidentiary proceeding." NASUCA Response to Fourth Supplemental Notice of Inquiry, August 6, 1982, p. 8.

## SUMMARY OF ARGUMENT

Certiorari is not warranted in this case. Sup. Ct. R. 17. NASUCA's claim that Section 205(a) required the FCC to utilize trial-type oral hearings is untenable in light of *United States* v. *Florida East Coast Railway*, 410 U.S. 224 (1973). This Court there construed a similar rate setting provision of the Interstate Commerce Act and held that notice-and-comment procedures suffice where an agency is designing industry-wide rates for future application. The decisions of the Courts of Appeals squarely support notice-and-comment procedures for policy-implementing agency rulemaking.

In this case, the FCC accumulated a vast amount of evidence through its notice-and-comment procedures. This course was well within its discretion in view of the prospective policy-related character of the issues and the industry-wide scope of the proceeding. The reasons belatedly offered by NASUCA for an evidentiary hearing are unpersuasive, measured against the discretion of the agency in structuring its own proceedings. The main issues listed by NASUCA as appropriate for an evidentiary hearing primarily relate not to the docket now under review but to the tariff proceedings that are currently underway at the agency and are not yet final.

## ARGUMENT

### I. Section 205(a) Imposes No General Obligation on the FCC To Employ Trial-Type Oral Hearings To Determine Industry-Wide Policy for the Future, and Neither Appellate Decisions Nor Prior FCC Practice Establish Such a Requirement.

NASUCA's basic procedural claim is that Section 205(a) required the FCC to utilize a trial-type oral hearing in this case. Pet. 17-30. That section empowers

the FCC to prescribe charges "after full opportunity for hearing." The difficulty with NASUCA's reliance on Section 205(a) is that this Court rejected precisely the same argument in *United States* v. *Florida East Coast Railway*, 410 U.S. 224 (1973). This Court there held that Section 1(14)(a) of the Interstate Commerce Act did not require the ICC to hold trial-type oral hearings before establishing incentive per diem rates for rail carriers.

This Court in *Florida East Coast* upheld the agency's use of notice-and-comment rulemaking because the incentive rates were "applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act," and "[n]o effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances." 410 U.S. at 246. The decision noted that the factual determinations the agency made were for use in "the formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts." *Id.* That language applies with equal force in the present case.[8]

The FCC, in determining future policy through rulemaking proceedings, has repeatedly decided industry-wide issues without trial-type oral hearings. The Courts of Appeals have repeatedly sustained such decisions. Examples include the FCC's introduction of intercity private line competition, the creation of a registration program for customer-provided terminal equipment, and the decision

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[8] *Florida East Coast*'s analysis was applied to Section 205(a) in *AT&T* v. *FCC*, 572 F.2d 17, 22-23 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978), where the Second Circuit found that trial-type oral hearings were not required for decisions establishing industry-wide, prospective policy.

to detariff enhanced services and terminal equipment.[9] The FCC's procedures in this case were therefore consistent with its own prior practice in resolving major policy issues, as well as with judicial precedent.

NASUCA asserts that in a prior FCC proceeding, reviewed in *Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975), the FCC did employ a trial-type evidentiary hearing in exercising its power to determine an appropriate rate of return for AT&T. *Nader* involved the setting of a rate of return for an individual company, however, not the establishment of industry-wide policy; as the Court of Appeals observed in this case, "the FCC [here] prescribed no specific revenue requirement and did not determine the legality of specific rates." Pet. App. 54a. More important, *Nader* did not hold that the FCC was *required* to have an evidentiary hearing even in the proceeding there involved, for no such issue was ever raised in the case.[10]

Similarly, there is no basis for NASUCA's claim that the FCC has acknowledged the need for trial-type oral hearings in prior FCC proceedings similar to this one. The main case cited by NASUCA (Pet. 24-25) involved solely a decision on the lawfulness of the particular rates used by a single carrier.[11] Trial-type oral hearings in cases

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[9] *E.g., Computer and Communications Industry Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983); *AT&T* v. *FCC*, *supra*; *North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[10] The *Nader* language quoted by NASUCA (Pet. 22-23) was in fact addressed to the question whether the FCC had power to prescribe rates of return. AT&T had not challenged the procedure used and the court therefore had no occasion to decide what minimum procedures would be appropriate.

[11] *In re AT&T*, 61 F.C.C.2d 587 (1976), *aff'd in part and rev'd in part*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

involving the specific rates of a specific carrier might arguably be required under *Florida East Coast,* but this is not such a case. Even if the two proceedings were identical (which they are not), "[t]he mere fact that an agency has once regarded evidentiary hearings as appropriate does not bar it from adopting another policy when changing or new circumstances require a different approach."[12]

In sum, NASUCA has no support for its claim that Section 205(a) or prior precedent and practice required trial-type oral hearings in this case. There is no conflict with any decision of this Court or any other Court of Appeals. On the contrary, the decisions of both (*e.g., Florida East Coast; AT&T* v. *FCC*) support the Commission and confirm the correctness of the affirmance below.

## II. NASUCA's Claim That an Oral Hearing Was Required in the Particular Circumstances of This Case Is Mistaken and Does not Present any Issue Appropriate for Review by This Court.

NASUCA appears to suggest that the facts of this case required a trial-type oral hearing even if it was not generally required by statute or past practice. But it is now settled under *Vermont Yankee* that the agency has substantial discretion in applying provisions of the act it administers and devising the procedures for doing so.[13] The FCC had ample basis in this case for employing notice-and-comment procedures and it did not abuse its discretion under the *Vermont Yankee* standard.

In this case, the FCC was not resolving a narrowly focused factual issue concerning an individual carrier where adjudicative procedures might be useful. Rather, it

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[12] *Bell Telephone Co.* v. *FCC,* 503 F.2d 1250, 1265 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975).

[13] *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 543-48 (1978). See also *Chevron, U.S.A.* v. *NRDC,* 104 S. Ct. 2778 (1984).

was making legislative-type judgments in setting policy for the entire industry. Given the range and nature of the issues, the number of parties, and the need to examine successive modified proposals, notice-and-comment rulemaking was eminently suited to the agency's task. Even with this efficient procedure, Docket No. 78-72 took six years. It is doubtful whether the proceeding would ever have been completed if trial-type oral hearings had been employed.[14]

The notice-and-comment procedures utilized by the FCC did not deprive it of evidence. Enormous quantities of evidence, including detailed statistics, financial information, descriptions of new developments in the industry, instances of threatened harm, and the like, were presented in numerous comments. The FCC took this information into account both in structuring its original plan and in modifying it several times. The court below specifically held that the FCC's determinations were "rationally grounded and sufficiently supported by evidence." Pet. App. 19a. Because the FCC could secure the necessary information in this way, its decision to use notice-and-comment rulemaking was clearly rational.

Nevertheless, NASUCA asserts that a trial-type oral hearing was required because of the importance of the case. Pet. 29-30. But the utility of trial-type hearings does not depend on the abstract importance of a case but on the nature of the issues, the scope of the proceeding, and the nature of the action proposed.[15] As *Florida East Coast*

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[14] The FCC stressed the need to place a new rate structure into effect before the adverse consequences of the existing system of *ad hoc* compensation arrangements became irreversible. See Pet. App. 31a.

[15] See, *e.g., Florida East Coast Railway, supra,* 410 U.S. at 245 (question is whether proceeding is "for the purpose of promulgating policy-type rules or standards, on the one hand," or "to adjudicate disputed facts in particular cases on the other"). See also *AT&T* v. *FCC, supra,* 572 F.2d at 22; 1 K. Davis, *Administrative Law Treatise,* § 6:23 at pp. 561-62 (2d ed. 1978); Friendly, "Some Kind of Hearing," 123 *U. Pa. L. Rev.* 1267, 1314-15 (1975).

made clear, trial-type oral hearings may be required to adjudicate a narrow factual claim involving a single party and yet be wholly unwarranted for determining broader and more far-reaching issues affecting a whole industry or market. 410 U.S. at 244-46.

General determinations of policy, based on legislative-type considerations, are the least appropriate subjects for trial-type oral hearings. As Judge Leventhal said in an analogous context, such issues involve expert opinion and forecasting and "cannot be decisively resolved by testimony."[16] Practically all of the most important policy decisions by the Commission in recent years have, as already noted, employed the same procedures used in this case, namely, notice-and-comment rather than trial-type oral hearings. The decisions thus reached have been sustained in circuit after circuit and this Court has repeatedly denied certiorari. See p. 8, n. 9, above.

NASUCA's other argument for trial-type oral hearings in this case rests on its list of six issues it now says should have been the subject of such a hearing. Pet. 26-27. The principal issues specified by NASUCA are the "capital structure" for telephone companies, their "investment level," their proper "[rate of] return," and their "level of operating and maintenance expenses." Pet. 26.[17] These are, of course, matters that vary from company to company in the industry and bear on the specific tariff rates ultimately charged by those companies. Such questions were not and did not have to be decided in order to

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[16] *American Airlines* v. *CAB*, 359 F.2d 624, 633 (D.C. Cir.) (*en banc*), *cert. denied*, 385 U.S. 843 (1966), quoted in *AT&T* v. *FCC*, *supra*, 572 F.2d at 23.

[17] The Commission clearly did not need to have a trial-type oral hearing in order to interpret its own Separations Manual, or to estimate the number of telephone lines in the country. Compare Pet. 26-27.

resolve the basic questions of industry-wide policy and rate structure with which the FCC was concerned in this docket.[18]

The FCC in substance resolved the policy and rate structure issues in this docket and then left the local telephone companies to frame and submit tariffs consistent with this new structure. The *Nader* case, relied on by NASUCA itself, is one of many precedents affirming the agency's authority to decide only issues essential to the case before it and to reserve other issues for subsequent proceedings. See 520 F.2d at 195-96. Here, the Commission proceeded rationally by determining the issues of rate structure in this docket and reserving for individual tariff proceedings other questions bearing on the lawfulness of the individual rates offered by the local telephone companies.[19]

Finally, the question whether the FCC acted rationally and within its discretion in selecting procedures to resolve this case is clearly not a question appropriate for review on certiorari. On such a particularized question, there is and can be no conflict with prior decisions of this Court or a Court of Appeals in any other circuit. To the extent prior decisions are relevant, *Vermont Yankee* established a standard of deference to the agency in its choice of procedures and the lower court respected that discretion in this case. There is no warrant for further review.

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[18] The issues of concern to the FCC were, for example, whether to make cost-causing customers pay their own costs; whether to provide a discount for allegedly inferior access; whether to impose a cap on end user charges; whether to require FX users and "leaky PBX" users to contribute to interstate costs; whether and when to allow rate averaging and whether to establish a universal service fund.

[19] NASUCA repeatedly refers to the FCC's estimate that certain fixed interstate costs will be "approximately $8.5 billion in 1984" as if this were a component of a final determination of a specific rate for a specific company. Pet. 19, 26-27. In fact, the figure was merely a gross estimate of the pertinent costs of all local telephone companies taken together; it did not determine the actual revenue requirement of any individual company, a matter which will be resolved in the tariff proceedings.

## CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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October 26, 1984

RULE 28.1 LISTING

American Telephone and Telegraph Company, which has no parent company, retains a minority interest in two companies that have outstanding securities in the hands of the public - Cincinnati Bell Inc. and The Southern New England Telephone Company.